

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GARY VERNARD PATTERSON,

Defendant-Appellant.

UNPUBLISHED

April 19, 2007

No. 267113

Wayne Circuit Court

LC No. 05-006457-01

Before: Neff, P.J., and O’Connell and Murray, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of felon in possession of a firearm, MCL 750.224f, felonious assault, MCL 750.82, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced, as a fourth habitual offender, MCL 769.12, to life imprisonment for the felon in possession of a firearm conviction, 32 months to 4 years’ imprisonment for the felonious assault conviction, and two years’ imprisonment for the felony-firearm conviction. Defendant appeals as of right. We affirm.

Defendant first contends that the trial court erred when it failed to give a missing witness instruction to the jury. We disagree. This Court reviews a trial court’s determination of the appropriateness of a missing witness instruction for an abuse of discretion. *People v Eccles*, 260 Mich App 379, 389; 677 NW2d 76 (2004).

Pursuant to the 1986 amendments to MCL 767.40a, the prosecution is no longer required to produce at trial, nor obligated to call as a witness at trial, a listed witness, including a res gestae witness. *People v Burwick*, 450 Mich 281, 287-290; 537 NW2d 813 (1995). Instead, the prosecution must notify a defendant of all known res gestae witnesses and all witnesses that the prosecution intends to produce. *Burwick, supra* at 289. Unless the prosecutor seeks to delete a witness from his witness list, as provided in MCL 767.40A(4), the prosecutor is obligated to exercise due diligence to produce the witness. *People v Wolford*, 189 Mich App 478, 484; 473 NW2d 767 (1991). If the prosecution fails to call a listed witness and has failed to delete that witness from its witness list, it may be appropriate for the trial court to read CJI2d 5.12, the missing witness instruction. *People v Perez*, 469 Mich 415, 420-421; 670 NW2d 655 (2003). The missing witness instruction is as follows:

_____ is a missing witness whose appearance was the responsibility of the prosecution. You may infer that this witness's testimony would have been unfavorable to the prosecution's case. [CJI2d 5.12; *Perez, supra* at 416.]

Here, the prosecution listed Mia Norman on its witness list and never deleted her from that list. Norman failed to show up at trial and defendant requested that the missing witness instruction be given to the jury. After examining Norman's out of court statement to police, the trial court concluded that a missing witness instruction was not necessary, given that Norman was not a *res gestae* witness¹ and could not provide any testimony beneficial to defendant. According to her statement, Norman was at defendant's apartment earlier in the evening on the night of the shooting, but left the apartment at 8:00 p.m., over four hours before the shooting took place. While at the apartment, she did not observe the victim of the shooting or a gun. She knew absolutely nothing about the shooting that occurred after she left, such as who committed it or why.

The determination whether a missing witness instruction should be given is to be made on a case-by-case basis, taking into account all of the specific facts of a case. *Perez, supra* at 420-421. Although *Perez* acknowledges that the missing witness instruction may be appropriate in certain circumstances, it notes that the missing witness's inability to provide testimony beneficial to the defendant is sufficient reason to not give the instruction. *Perez, supra* at 417-418, 420. Consequently, the trial court in the instant case did not err when it failed to give the missing witness instruction on the ground that Norman's testimony was not helpful to defendant.

Moreover, to the extent that the prosecution's due diligence plays a role in whether a trial court should give a missing witness instruction, it should be noted that there was no finding that the prosecution in the instant case did not exercise due diligence. With regard to the prosecution's inability to personally serve Norman, the prosecutor noted:

There is one witness on the People's Witness List, a Ms. Mia Norman, who has not appeared. The police have not been able to serve her. They have gone to her home, left subpoenas there, left messages at her home. They have not subpoenaed her. I'm not going to say that we exercised complete diligence, as they just, you know, they didn't stake her out or anything like that.

The prosecution's failure to "stake [Norman] out" does not necessarily suggest that due diligence was lacking. Due diligence is the attempt to do everything reasonable, not everything possible, to obtain the presence of a witness. *Eccles, supra* at 391. In light of the fact that the police went to Norman's home in an attempt to personally serve her, and left messages and subpoenas at her home, it appears that the prosecution did use due diligence.

¹ Generally, persons present at the scene of a crime at the time of the crime are presumed to be *res gestae* witnesses. *People v Lamar*, 153 Mich App 127, 137; 395 NW2d 262 (1986), superseded by statute on other grounds *People v Calhoun*, 178 Mich App 517; 444 NW2d 232 (1989). *Res gestae* witnesses also encompass any other witnesses whose testimony may aid in making a fair presentation of the *res gestae* of the crime charged and may be necessary to protect the accused from being the victim of a false accusation. *Id.* at 138.

Second, defendant argues that the trial court did not have substantial and compelling reasons to deviate from the sentencing guidelines, and, even if it did, the basis for deviation was insufficient to support the extent of the deviation. We disagree.

Whether a particular sentencing factor exists is a factual determination for the sentencing court to determine, and it will be reviewed for clear error. *People v Babcock*, 469 Mich 247, 264; 666 NW2d 231 (2003), on rem 258 Mich App 679; 672 NW2d 533 (2003). Whether a particular sentencing factor is objective and verifiable will be reviewed de novo. *Babcock, supra* at 265. Whether the objective and verifiable factors constitute substantial and compelling reasons to depart from the statutory minimum sentence will be reviewed for abuse of discretion. *Babcock, supra* at 265. An abuse of discretion occurs when the sentencing court chooses an outcome that falls outside the permissible principled range of outcomes. *Babcock, supra* at 269.

MCL 769.34(3) provides:

A court may depart from the appropriate sentence range established under the sentencing guidelines set forth in chapter XVII if the court has a substantial and compelling reason for that departure and states on the record the reasons for departure.

A substantial and compelling reason must be construed to mean an objective and verifiable reason that keenly or irresistibly grabs the court's attention, is of considerable worth in deciding the length of a sentence, and exists only in exceptional cases. *Babcock, supra* at 258, citing *People v Fields*, 448 Mich 58, 62, 67-68; 528 NW2d 176 (1995). "The court shall not base a departure on an offense characteristic or offender characteristic already taken into account in determining the appropriate sentence range unless the court finds from the facts contained in the court record, including the presentence investigation report, that the characteristic has been given inadequate or disproportionate weight." MCL 769.34(3)(b).

Defendant challenges the sentence of life in prison that he received with respect to his felon in possession of a firearm conviction. Pursuant to MCL 777.16m, felon in possession of a firearm is a Class E felony under the public safety category. Defendant scored within the E-V range, with a minimum sentence range of 19 to 38 months. As the prosecutor pointed out at sentencing, the scoring sheet improperly failed to take into account defendant's status as a fourth habitual offender, bringing the proper minimum range to 19 to 76 months. Defendant does not contest the amended scoring.

Defendant received 25 points for PRV 1, which takes into account that defendant had one prior high severity conviction, pursuant to MCL 777.51. Defendant received 30 points for PRV 2, which takes into account that defendant has four or more prior low severity convictions, pursuant to MCL 777.52. Defendant received ten points for PRV 7, which takes into account that defendant has one subsequent or concurrent felony conviction, pursuant to MCL 777.57. Defendant's total PRV score of 65 placed him in the PRV level of E.

Defendant received 25 points for OV 1, which takes into account that a firearm was discharged at or toward a human being, pursuant to MCL 777.31. Defendant received 25 points for OV 3, which takes into account that a life threatening or permanent incapacitating injury occurred to a victim, pursuant to MCL 777.333. Finally, defendant received one point for OV

12, which takes into account that one contemporaneous felonious criminal act involving another crime was committed, pursuant to MCL 777.42. Defendant's total OV score of 51 placed him in the OV level of V.

After a review of the sentencing transcript, we conclude that the trial court had substantial and compelling reasons to depart from the guidelines, and those reasons were either not accounted for in the guidelines or inadequately accounted for. First, none of the offense variables scored took into account defendant's poor institutional record. Defendant had prior felony convictions for assaultive crimes, some of which were committed while on parole and one while defendant was in prison. A poor institutional record is properly considered by the court in deviating from the guidelines. *People v Thomas*, 263 Mich App 70, 79; 687 NW2d 598 (2004). Second, the fact that defendant shot the victim was not taken into account by the guidelines. "Although offense variable (OV) 1 considers whether a firearm was discharged at or toward a human being and OV 3 considers whether a victim suffered bodily injury that required medical treatment, see MCL 777.31(1)(a), 777.33(d), neither variable considers someone actually being shot. Injury to a victim as a result of being shot is in fact a substantial and compelling reason to depart from the guidelines" *People v Lowery*, 258 Mich App 167, 171; 673 NW2d 107 (2003). Third, defendant's failure to rehabilitate, as evidenced by his multiple felony convictions over time, may properly support an upward deviation. *People v Geno*, 261 Mich App 624, 636; 683 NW2d 687 (2004). Here, defendant's criminal history, which includes seven prior felony convictions, demonstrates defendant's repeated failure to rehabilitate himself. Fourth, defendant has a juvenile record which was never taken into account. Fifth, in light of the fact that several of defendant's convictions are for assaultive offenses, the necessity of protecting future potential victims is a factor inadequately considered by the guidelines and one which may support an upward deviation. *People v Armstrong*, 247 Mich App 423, 425; 636 NW2d 785 (2001).

If there is a substantial and compelling reason for the departure, the extent of the departure is reviewed for an abuse of discretion. *Babcock, supra* at 265. A given sentence constitutes an abuse of discretion if that sentence violates the principle of proportionality, which requires that the sentence be proportional to the seriousness of the circumstances surrounding the offense and offender. *Lowery, supra* at 172.

The challenged sentence does not amount to an abuse of discretion. Defendant's record indicates that, despite his involvement with the justice system that began when he was a juvenile and has continued for decades, defendant has persisted to engage in criminal activity. As a fourth habitual offender, defendant's maximum sentence is life in prison. MCL 769.12(1)(a). Additionally, the nature of his most recent offense is particularly violent and egregious. Defendant, a felon who was ineligible to possess a firearm at the time of the incident, shot the victim in the chest, causing serious injury from which the victim has yet to recover. Defendant's life sentence does not violate the principle of proportionality and should be upheld.

Affirmed.

/s/ Janet T. Neff
/s/ Peter D. O'Connell
/s/ Christopher M. Murray